Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1999

LANCE E. SHEPLER,
Petitioner,

-vs-

ED EVANS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of collateral estoppel warrants federal habeas relief and precludes a state court conviction for Rape after an essential element of the offense (i.e. penetration) was found not to exist in an earlier juvenile (deprived child) case which was combined with the criminal case preliminary hearing held prior to the trial on the rape charge.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner, Lance E. Shepler, and Ed Evans, Warden of the James Crabtree Correctional Center, the state correctional facility in Helena, Oklahoma in which Petitioner is incarcerated.

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Petitioner, Lance E. Shepler, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in Shepler v. Evans, No. 99-7021 is not published. The opinion of the United States District Court for the Eastern District of Oklahoma in Shepler v. Evans, No. CIV 96-231-S is not published. The opinion of the Oklahoma Court of Criminal Appeals in Shepler v. State, No. 94-1195, is not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on July 27, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "Nor shall any person be subject for the same offense to be twice put in jeopardy."

28 U.S.C. §2254(a) provides in pertinent part: "The Supreme Court, a Justice thereof, a circuit judge, or a district

court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

21 O.S. §1111.1 provides in pertinent part: "Rape by instrumentation is an act within or without the bonds of matrimony in which any inanimate object or any part of the human body, not amounting to sexual intercourse is used in the carnal knowledge of another person without his or her consent and penetration of the anus or vagina occurs to that person."

10 O.S. §7003-4.4 (renumbered from 10 O.S. 1995, §1113) provides: "If the court finds that the allegations of the petition are not supported by the evidence, the court shall order the petition dismissed and shall order the child discharged from any custody. The child's parents, guardian or other legal custodian shall also be discharged from any restriction or other previous temporary order."

STATEMENT OF THE CASE

Proceedings in State Criminal District and Appellate Courts

Petitioner was convicted of Rape by Instrumentation, in violation of 21 O.S. §1111.1 after jury trial in the District Court of Johnston County, Oklahoma on November 3, 1994. Petitioner was sentenced to a term of 35 years in the Oklahoma Department of Corrections. Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals. Petitioner's conviction was affirmed

by the Oklahoma Court of Criminal Appeals by Summary Opinion dated December 21, 1995.

Proceedings in Federal District Court and 10th Circuit

On March 19, 1996, Petitioner filed a Petition for Writ of Habeas Corpus requesting relief under 28 U.S.C. §2254 in the U. S. District Court for the Western District of Oklahoma on March 19, 1996 (CIV 96-433-L). On May 15, 1996, the Hon. Tim Leonard, U. S. District Judge for the U.S. District Court for the Western District of Oklahoma entered an Order transferring the case to the U.S. District Court for the Eastern District of Oklahoma pursuant to 28 U.S.C. §2241(d). The District Court entered an Order on June 12, 1996 directing the Respondent to Answer the Petition. The Respondent submitted his Answer with Attachments on or around July 15, 1996. On October 21, 1997, the District Court entered an Order directing Respondent to submit state court records, specifically, the court file involving the juvenile (deprived child) proceeding, "In the Matter of A.P., an Alleged Deprived Child," Case No. J-92-16, District Court of Johnston County, Oklahoma.

The Hon. James Payne, U. S. Magistrate Judge issued his Findings and Recommendation on October 27, 1998 wherein he recommended that the petition for writ of habeas corpus be denied finding that Petitioner met all but one of the four elements required for collateral estoppel, the requirement that the issue was "necessary" to support the judgment in the prior proceeding. After Petitioner submitted his Objections to such findings and recommendation, the Hon. Frank

H. Seay, U.S. District Judge, entered an Order on January 13, 1999 denying the petition for writ of habeas corpus.

Subsequent thereto on February 5, 1999 Petitioner filed his Notice of Appeal of the District Court's decision and brought an appeal to the United States Court of Appeals for the Tenth Circuit. On July 27, 1999, the Tenth Circuit denied Petitioner's appeal and denied the application for a certificate of probable cause.

The Order in the State Court Juvenile (Deprived Child) Case

The state court criminal prosecution of Petitioner for the rape charge was held simultaneously with a juvenile (deprived child) proceeding. In fact, a combined "preliminary hearing" on the rape charge and an "adjudication hearing" on the deprived juvenile case was held on or around February 10, 1993. The juvenile action Petition asserted that Petitioner committed "alleged sexual abuse" upon the child. Based upon the testimony presented at said combined criminal/juvenile hearing, the District Court of Johnston County, Oklahoma, acting through Hon. Robert M. Highsmith, Associate District Judge, entered an Order on February 11, 1993 in which he made findings that:

> ...the penetration required for any form of rape is vaginal and there is no such proof in this case....This Court finds no "sexual abuse" per se in this case, no rape by instrumentation....

Notwithstanding the above finding and order, on March 8, 1993, Petitioner was bound over to stand trial on the rape charge and was eventually convicted of the rape charge.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW PERTAINING TO DOUBLE JEOPARDY THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case involves an important issue in the area of double jeopardy and collateral estoppel. This case involves a novel issue which has not been addressed by the Court, to-wit: whether a finding of lack of penetration in a juvenile (deprived child) proceeding which is combined with a criminal case preliminary hearing precludes such issue being tried again in a subsequent criminal case involving the same parties. The Tenth Circuit opinion below denied Petitioner's appeal, holding that different standards of proof in the different proceedings precluded application of the collateral estoppel doctrine. The Tenth Circuit cited two opinions for this holding. ***United States v. One Assortment of 89 Firearms***, 465 U.S. 354, 362 (1984); ***Helvering v. Mitchell***, 303 U.S. 391, 397 (1938). In ***89 Firearms***, this Court held that a gun owner's acquittal on criminal charges involving firearms does not

preclude a subsequent *in rem* forfeiture proceeding against the firearms under 18 U.S.C. §924(d). 465 U.S. at 362. In ***Helvering***, this Court held that an acquittal for tax fraud did not determine whether the defendant had willfully attempted to evade the tax. 303 U.S. at 397.

Clearly, the above two opinions of this Court cited by the Tenth Circuit are distinguishable. Neither involved a juvenile/deprived child proceeding as was the situation in the instant case, and neither involved a situation which *combined* juvenile and criminal cases. Moreover, the two opinions of this Court cited by the Tenth Circuit both involved situations where the first proceeding was a criminal proceeding with a higher standard of proof (i.e. beyond a reasonable doubt) than the subsequent civil actions. In the instant case, the first proceeding, i.e. the juvenile/deprived child case involved a "clear and convincing evidence" standard, which was followed by a criminal proceeding. This obviously led to an absurd result. What the State could not prove under the lesser clear and convincing evidence standard, it was inexplicably allowed an opportunity to prove the same issue, i.e. penetration, under a higher standard in the criminal case.

It should also be noted that in all of the lower court proceedings, neither the Respondent, the U.S. District Court, nor the Tenth Circuit cited any opinion by this Court which involved the issue of the application of the collateral estoppel in a criminal proceeding based upon a previous finding from a

juvenile/deprived child case. The only case cited by the Respondent or any of the reviewing courts which involved the collateral estoppel issue and a juvenile case was a Kentucky case, ***Gregory v. Commonwealth***, 610 S.W.2d 589 (Ky. 1980) (which is distinguishable as it did not combine the juvenile/criminal hearings as was done in the instant case). In short, the opinions of this Court cited by the Tenth Circuit to defeat Petitioner's claim did not involve juvenile/deprived child proceedings, and such opinions involved situations which involved acquittals in cases with a higher standard of proof than the subsequent civil proceedings. In the instant case, a judicial finding under the "clear and convincing evidence" standard was made that there was no penetration. Subsequently in the criminal case, Petitioner was convicted of the rape charge which included the element of penetration.

In short, this Court has not addressed the collateral estoppel issue in the situation where a finding in a juvenile/deprived case is urged as a basis to collaterally estop a subsequent criminal prosecution, the first portion of which was combined with the juvenile case. Notwithstanding the lack of published decisions involving juvenile cases and the collateral estoppel issue, this is an area that has the potential to arise not infrequently. Accordingly, this Court should grant the petition for certiorari to address this novel issue.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW PERTAINING TO DOUBLE JEOPARDY IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Tenth Circuit's opinion denying Petitioner's claim for federal habeas relief is contrary to this Court's opinions in ***Ashe v. Swenson***, 397 U.S. 436, 445 (1970) and ***Yates v. U.S.***, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). The Tenth Circuit's opinion held that since there are different standards of proof in a juvenile/deprived child case and a criminal case, the doctrine of collateral estoppel cannot be applied. In ***Ashe***, this Court held that the double jeopardy clause of the Constitution, as applied to the states through the Fourteenth Amendment, embodies the doctrine of collateral estoppel, or issue preclusion, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." ***Id*** at 443. In ***Yates v. U.S.***, this Court held that the doctrine of collateral estoppel is not made inapplicable when invoked in a criminal case where the prior proceeding was civil in nature. ***Yates v. U.S.***, 354 U.S. 298, at 335.

Clearly, the issue of whether there was penetration had been litigated between the State and Petitioner in the juvenile/deprived child case and it was specifically found that, based upon the same evidence used for the

criminal case preliminary hearing, there was no penetration. It is also significant that the juvenile/deprived child case was combined with the criminal case preliminary hearing. In essence, the juvenile case was a *de facto* criminal case since it was combined with the criminal case and was based upon the same evidence. Notwithstanding this finding, the Petitioner was eventually tried on the criminal charge of rape, which contains the essential element of penetration. The rule set forth by this Court in ***Ashe v. Swenson*** that collateral estoppel does apply to criminal proceedings, and the holding by this Court in ***Yates v. U.S.*** that collateral estoppel can be invoked in a criminal case where the prior case was civil in nature, are contrary to the Tenth Circuit's opinion. Accordingly, the petition for writ of certiorari should be granted to rectify the erroneous decision of the Tenth Circuit.

CONCLUSION

This case presents a novel question of considerable significance—whether collateral estoppel bars a conviction based upon an essential element of the offense which was found not to exist in a prior companion juvenile/deprived child proceeding which had a lower standard of proof. Moreover, the Tenth Circuit's opinion is contrary to this Court's holding in ***Ashe v. Swenson, supra***, that the collateral estoppel doctrine does apply in criminal proceedings, and this Court's holding in ***Yates v. U.S., supra***, that collateral estoppel can be invoked in a criminal case where the prior case was civil in nature. If the Tenth Circuit's opinion is allowed to stand, Petitioner will have been denied one of the Constitution's most

fundamental rights, the right not to be subjected to twice being tried for the same offense.

Accordingly, Petitioner, Lance E. Shepler, respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Tenth Circuit Filed July 27, 1999

United States Court of Appeals
Tenth Circuit

Lance E. Shepler,	)	Filed July 27, 1999
Petitioner-Appellant,	)	Patrick Fisher
	)	Clerk
-vs-	)	
	)	
Ed Evans, Warden;	)	
Attorney General of	)	
the State of Oklahoma,	)	
Respondents-Appellees.	)	No. 99-7021

ORDER AND JUDGMENT[1]

Before ANDERSON, KELLY and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case therefore submitted without oral argument.

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[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Lance E. Shepler, a state prisoner represented by retained counsel, seeks a certificate of probable cause to appeal the district court's denial of his 28 U.S.C. §2254 habeas petition.[2] Because Shepler has failed to make a "substantial showing of the denial of [a] federal right, Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (internal quotation marks and citation omitted), we deny a certificate of probable cause and dismiss the appeal.

I.

Shepler was charged in November 1992 in the District Court of Johnston County, Oklahoma with one count of rape by instrumentation of his infant daughter. See Okla. Stat. Ann. tit. 21, §1111.1 (West Supp. 1999). Three months later, the court combined Shepler's preliminary hearing on the rape charge with an adjudicatory hearing designed to assess whether his daughter had been "deprived," see Okla. Stat. Ann. tit. 10, §1101(4) (West Supp. 1994), and should be placed in protective custody. Following this combined hearing, the court concluded the state had not proved sexual abuse (or, more specifically, rape by instrumentation) by clear and convincing evidence as is required to establish that a child has been deprived. See Matter of C.G., 637 P.2d 66, 780-71 (Okla. 1981).

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[2]Because Shepler filed his petition on March 19, 1996, the Antiterrorism and Effective Death Penalty Act, which became effective April 24, 1996, and mandates the issuance of a certificate of appealability as a prerequisite to the appeal of a denial of a §2254 petition, does not apply. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997).

The court nevertheless found the state had shown, by clear and convincing evidence, that Shepler had used unreasonable and excessive force against his daughter and thus adjudicated the child "deprived." In a signed minute order, the court specifically noted that its ruling on the sexual abuse allegations was confined to the *clear and convincing evidence* proof standard and that it would issu8e a subsequent opinion regarding whether the state had advanced *probable cause* of rape by instrumentation. Less than one month later, the court concluded probable cause of rape by instrumentation had been established and ordered defendant bound over for trial.

After a two-day trial, Shepler was convicted of rape by instrumentation and was later sentenced to thirty-five years imprisonment. The Oklahoma Court of Criminal Appeals affirmed Shepler's conviction in a summary opinion. In March 1996, Shepler filed the instant habeas petition asserting his conviction must be reversed because (1) the doctrine of collateral estoppel should have barred the state from pursuing the prosecution based on the trial court's rulings at the "deprived child" adjudication hearing, and (2) the criminal information charging him with rape by instrumentation was deficient. The district court, adopting the report and recommendation of the magistrate judge, denied relief.

II.

Collateral Estoppel

The Double Jeopardy Clause of the Constitution, as applied to the states through the Fourteenth Amendment, embodies the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 445 (1970). Collateral estoppel, or, as it is often known, issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Id. at 443. The doctrine is inapplicable here. As the state trial court made clear in its rulings, the burden of proof requirement at the initial "deprived child" adjudication hearing was considerably greater than the proof standard at the preliminary hearing. The fact that the state did not establish evidence of rape by clear and convincing evidence did not necessarily mean that the state did not demonstrate probable cause of rape. The differences in proof standards preclude application of the collateral estoppel doctrine. See United States v. One Assortment of 89 Firearms, 465 U.S. 354,362 (1984); Helvering v. Mitchell, 303 U.S. 391, 397 (1938).

Sufficiency of Indictment

Shepler also contends the criminal information charging him with rape by instrumentation failed to allege the victim was under sixteen years old and thus was deficient as a matter of law. We need not reach the merits of this argument. "The

sufficiency of an indictment orinformation is primarily a question of state law." Tapia v. Tansy, 926 F.2d 1554, 1560 (10th Cir. 1991). "[F]ederal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1980)). Although the notice provided by a charging instrument must comport with the due process guarantee of a fair trial, see Jackson v. Virginia, 443 U.S. 307, 314 (1970), there is no suggestion here that Shepler did not have adequate notice of the specific charges being leveled against him.

Shepler's application for a certificate of probable cause is DENIED and his appeal is DISMISSED. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

Appendix B — Opinion of the United States District Court for the Eastern District of Oklahoma Filed January 13, 1999

In the United States District Court for the Eastern District of Oklahoma

Lance E. Shepler,	) Filed Jan. 13, 1999
Petitioner,	) William B. Guthrie
	) Clerk
-vs-	)
	)
Ed Evans, Warden,	)
Respondent.	) No. CIV 96-231-S

ORDER

On October 27, 1998 the United States Magistrate Judge for this District filed Findings and Recommendations in this case. On November 12, 1998, the Petitioner filed objections to those Findings and Recommendations alleging the United States Magistrate Judge erred in his Findings as to the issues related to collateral estoppel and the defective information issue raised in Petitioner's objections.

This court finds the record before the court specifically documents and supports the Findings and Recommendations of the United States Magistrate Judge as it relates to the collateral estoppel issue. As to the defective

information issue, the Petitioner has argued the original information filed November 17, 1992 failed to include an essentialelement of the crime charged. This element was the allegation that the alleged victim was under the ageof 16. Petitioner argues that pursuant to Miller v. State of Oklahoma, 827 P.2d 875 (Okl.Cr. 1992) if the information does not have all of the elements of the crime alleged in the information, then the trial court lacks subject matter jurisdiction. Thus, Petitioner argues he is entitled to a writ of habeas corpus since the trial court did not have subect matter jurisdiction.

In the Magistrate Judge's Findings and Recommendations suggesting that the Petitioner's writ be denied, it states in Parker v. State of Oklahoma, 917 P.2d 980 (Okla. Crim. App. 1996) the Oklahoma Court of Criminal Appeals overruled the holding in Miller. The Parker case held the omission of facts constituting an offense may raise due process issues but it does not affect the jurisdiction of the trial court. Parker at 985. In his objection, the Petitioner argued he filed his writ of habeas corpus originally in the United States District Court for the Western District of Oklahoma on March 19,1996. The Parker decision was rendered on April 23, 1996. Thus, Petitioner argues the Magistrate Judge improperly applied the Parker decision retroactively to his case. Petitioner is correct in stating the rule enumerated in Parker is not to be applied retroactively. Darks v. State of Oklahoma, 954 P.2d 152, 157-158 (Okla. Crim. App. 1998). However, this court finds that regardless of the Magistrate Judge's application of Parker to its decision, there was still no jurisdictional defect to render a writ of habeas corpus proper.

The record reveals that on March 9, 1993 the State of Oklahoma filed an amended information which set forth the victim was under the age of 18 and states the victim states the victim was A.P. The Petitioner has not in his pleadings put forth any allegations that some action was taken to his prejudice prior to this amendment of the information. While the state court jurisdiction may have been in question when the information was filed on November 17, 1992, the amended information filed March 9, 1993 cured any defect in jurisdiction. Accordingly, this court finds that Petitioner's objections to the Magistrate Judge's Findings and Recommendations are without merit and they are denied.

Upon full consideration of the entire record and the issues herein, this court finds and orders that the Findings and Recommendations of the United States Magistrate be affirmed and adopted by this court as this court's Findings and Order, and Petitioner's writ of habeas corpus is denied.

IT IS SO ORDERED this 13th day of January, 1999.

Frank H. Seay
United States District Judge

Appendix C — Findings and Recommendation of the United States Magistrate Judge Hon. James Payne for the United States District Court for the Eastern District of Oklahoma Filed October 27, 1998

In the United States District Court for the Eastern District of Oklahoma

Lance E. Shepler,	)	Filed October 27, 1998
Petitioner,	)	William B. Guthrie
	)	Clerk
-vs-	)	
	)	
Ed Evans, Warden,	)	
Respondent.	)	No. CIV 96-231-S

FINDINGS AND RECOMMENDATION

NOW before the Magistrate Judge is petitioner's petition for writ of habeas corpus. Petitioner, an inmate currently incarcerated at James Crabtree Correctional Center in Helena, Oklahoma, attacks his conviction in Johnston County District Court Case Number CRF-92-98 for Rape by Instrumentation.

Petitioner sets forth the following grounds for relief:

I. Conviction was obtained by violation of the protection against [sic] collateral estoppel.

II. Conviction was obtained without the trial court having subject matter jurisdiction of the case.

Respondent concedes that petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review and has submitted the following records to the court for consideration in this matter:

A. Petitioner's brief in his direct appeal.

B. The State's brief in petitioner's direct appeal.

C. The summary opinion affirming petitioner's judgment and sentence in his direct appeal. Shepler v. State, No. F-94-1195 (Okla. Crim. App. Dec. 21, 1995).

D. The trial court's order on demurrer and motion to dismiss. State v. Shepler, No. CRF-92-98 (Johnston County Dist. Ct. Mar. 8, 1993).

E. Information and alternative information filed November 17, 1992, charging petitioner with Rape by Instrumentation, First Degree, Okla. Stat. tit. 21 §1111.1, and Count II information filed March 9, 1993, charging Petitioner with Injury of Minor Child, Okla. Stat. tit. 21 §843.

F. Transcripts of petitioner's combined hearings in CRF-92-98, his criminal case, and J-92-16, the juvenile case.

G. Certified copy of docket sheet and state court pleadings in J-92-16.

Ground I

Because the alleged victim of petitioner's crime was his infant daughter, a hearing was held to determine whether the child was deprived and should be placed in protective custody. Petitioner and the State agreed to combine the deprivations hearing with petitioner's preliminary hearing, and the same evidence was used at both hearings. Following the hearing, the court found no clear an convincing evidence of penetration, "no 'sexual abuse' per se in this case, no rape by instrumentation, but [did] find that unreasonable and excessive forced [sic] was applied to this child resulting in this injury and that the same [was] sufficient to fall within the definition of 'deprived child' at Title 10 O.S. 1101(4)(b)." In the Matter of A.P., No. J-92-16, slip op. at 2 (Johnston County Dist. Ct. Feb. 11, 1993).

Petitioner then filed a motion to dismiss based on the court's ruling, alleging the State was collaterally estopped from seeking the Rape by Instrumentation count. The motion was overruled at a motion hearing and when it was re-urged at trial. In its Order on Demurrer and Motion to Dismiss, the trial court held that while there was not clear and convincing evidence of penetration in the juvenile proceeding, the lesser standard of probable cause was met for the purposes of petitioner's preliminary hearing. State v. Shepler, No. CRF-92-98, slip op. at 1 (Johnston County Dist. Ct. Mar. 8, 1993).

In this habeas petition, petitioner asserts that penetration, an essential element of the Rape by Instrumentation conviction and the actual crime itself, was found not to exist in the prior juvenile proceeding. Therefore, according to petitioner, the State was collaterally estopped from pursuing that charge.

Respondent acknowledges that the doctrine of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 445 (1970). However, respondent contends no double jeopardy concerns are implicated, because the prior hearing was a civil hearing to determine whether the child was deprived. Although the judge found there was not clear and convincing evidence of penetration, a determination of penetration was not required in the civil juvenile proceeding.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe, 397 U.S. at 443. The Tenth Circuit Court of Appeals has set forth four requirements that the issue must meet in order to have a preclusive effect in Oklahoma:

> "[T]he issue sought to be precluded must be the same as that involved in the prior judicial proceeding; the issue was litigated in the prior action; the issue was in fact actually determined in the prior proceeding; and the determination of that issue

> was necessary to support the judgment in the prior proceeding."

Franklin v. Thompson, 981 F.2d 1168, 1170 (10th Cir. 1992) (quoting Adamson v. Dayton Hudson Corp., 774 P.2d 478, 480 (Okla. Ct. App. 1989)).

After a careful review of the record, the court finds that while the first three requirements were met, the fourth requirement for the application of collateral estoppel is not present. The trial court did find there had been no penetration or sexual abuse, but that determination was not necessary to support the adjudication of petitioner's daughter as a deprived child. To the contrary, the trial court rendered its decision despite the finding of no penetration or sexual abuse, and based its order on the application of unreasonable and excessive force having caused the child's injury. This ground for habeas relief, therefore, fails.

Ground II

Petitioner next argues that the information alleging Rape by Instrumentation lacked an essential element of the charge, the victim's being under the age of sixteen years. He contends the information was void, so the trial court lacked subject matter jurisdiction. Respondent points out that although the original information did not include language that the alleged victim was under sixteen, the amended information contained this fact. Further, the information specifically identified the alleged victim, petitioner's infant daughter.

"The sufficiency of an indictment or information is primarily a question of state law.'" Tapia v. Tansy, 926 F.2d 1554, 1560 (10th Cir. 1991, cert. denied, 502 U.S. 835 (1991) (quoting Franklin v. White, 803 F.2d 416, 418 (8th Cir. 1986)). In Parker v. State, 917 P.2d 980, 985-86 (Okla. Crim. App. 1996), the Oklahoma Court of Criminal Appeals overruled its holding in Miller v. State, 827 P.2d 875, 878 (Okla. Crim. App. 1992), that the failure of an information to allege all elements of the charged crime was fatal to jurisdiction. "[A] trial court's jurisdiction is triggered by the filing of an Information alleging the commission of a public offense with appropriate venue." Parker, 917 P.2d at 985 (footnote omitted). The omission of alleged facts constituting an offense raises due process issues but does not affect the jurisdiction of the trial court. Id.

This court finds that the trial court's jurisdiction is an issue of state law not cognizable in this habeas action. "[F]ederal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990)). Petitioner's second ground for habeas relief, therefore, is without merit.

ACCORDINGLY, the Magistrate Judge recommends that this action be, in all respects, dismissed.

Pursuant to 28 U.S.C. §636(b)(1)(C) and Local Rule 72.1(C), the parties are given ten (10) days from being served with a copy of these findings and recommendations to file with the Clerk of the Court any objections

with supporting briefs. Failure to file timely written objections to the Magistrate Judge's recommendations may result in waiver of appellate review of factual and legal questions. Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996); Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 27th day of October 1998.

JAMES H. PAYNE
UNITED STATES MAGISTRATE JUDGE